Filed 1/10/11 In re Y.K. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re Y.K., a Person Coming Under the Juvenile Court Law.	B226151 (Los Angeles County Super. Ct. No. CK49459)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MILDRED H. et al., Defendants and Appellants.	

APPEAL from the orders of the Superior Court of Los Angeles County, Albert Garcia, Juvenile Court Referee. Affirmed.

John Cahill, under appointment by the Court of Appeal, for Defendant and Appellant Mildred H.

Ernesto Paz Rey, under appointment by the Court of Appeal, for Defendant and Appellant Clarence K. III.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Jeanette Cauble, Senior Deputy County Counsel, for Plaintiff and Respondent.

Mildred H. (mother) and Clarence K. III (father) appeal from orders denying their petitions under section 388 of the Welfare and Institutions Code[1] and terminating parental rights to their son, Y.K. They contend denial of their section 388 petitions was an abuse of discretion and substantial evidence does not support the order terminating parental rights. We affirm.

FACTS AND PROCEDURAL HISTORY

Y. was born in April 2008 to mother and father,[2] who lived together. Y. was detained at birth by the Department of Children and Family Services (Department), because mother and father had a history of endangering their children. Mother, a former court dependent, was 20 years old; Y. was her fourth child. She had a juvenile and adult criminal history and was incarcerated for two years for solicitation and traffic tickets. Father had psychiatric problems, abused drugs, and had an extensive history of criminal offenses involving property, drugs, and violence. He was incarcerated during at least 20 of his 39 years, including 10 years for a conviction of assault with a deadly weapon.

Mother's three older children, R., born in 2002, T., born in 2004, and A., born in 2006, were dependents of the court, because mother abused drugs and abandoned the

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] The dependency court found father to be Y.'s presumed father.

children. Parental rights to R. were terminated in 2004, and R. was adopted. No reunification services were ordered for mother with T. and A. Mother did not stay in touch with T. and A. in placement, where T. and A. suffered severe, repeated, physical abuse. T. died from physical abuse in October 2006. Parental rights to A. were terminated, and A. was adopted.

Father had one other child, C., who was born in 1991. Father left C. with paternal grandfather, in whose care C. was repeatedly sexually molested for six years by an unrelated person. C. was made a dependent of the court, and father was offered reunification services. Father reunified with C. briefly in 2009, but C. disclosed father physically abused him and mother. C. was ordered into permanent placement.

At the detention hearing on May 1, 2008, mother and father were ordered to participate in drug rehabilitation with random testing, and individual counseling. Father was ordered to also participate in a fatherhood group. Parents were granted monitored visits, two to three times per week, for two to three hours. Father enrolled in group therapy at Project Fatherhood in 2008.

On October 29, 2008, Y. was declared a dependent of the court based on sustained allegations under section 300, subdivision (b) that: mother had a history of substance abuse, and Y.'s siblings R. and A. were in permanent placement due to mother's drug abuse; father had a history of substance abuse, tested positive for marijuana during September and October 2008, and was convicted of possession of a narcotic controlled substance; and father had mental and emotional problems which rendered him incapable of providing regular care and supervision, and placed the child at risk of harm. Custody was taken from parents and reunification services were ordered. Parents were to participate in drug rehabilitation with random testing, parenting classes, a fatherhood group, individual counseling, and a psychiatric evaluation. Monitored visits two to three times per week for two to three hours were ordered, except mother was granted unmonitored visits in placement. Noting that "father is testing at various levels of marijuana from extreme high levels to very low levels," the dependency court stated: "I

want to encourage the father to let the marijuana go. It will inhibit reunification entirely."

Parents failed to reunify with Y. Father was prescribed psychiatric medication, but he did not take it. He did not participate in individual counseling or complete a drug program, and all his tests were either positive for cannabinoids or missed tests. He was discharged from parole in July 2009. While on parole, he did not drug test for marijuana and failed to complete parole's drug program. He refused to allow the therapist he saw monthly through parole to talk to the Department.

Mother engaged in street prostitution. Father was the pimp for mother and a 17-year-old maternal aunt. Mother had one positive drug test and ten missed tests. She started and stopped numerous drug programs, missed numerous tests, and had one positive test. She did not receive individual counseling.

During visits, father used negative language toward the foster mother and tried to start arguments with her. Father's aggressiveness caused the foster mother to stop bringing Y. to parents' home for visits. Parents cancelled many visits and were late to others. Prior to January 2009, parents had occasional visits twice a month, and in January and February 2009, they had a total of two visits. Thereafter, they had sporadic visits one to four times per month and were late several times.

At the review hearing on August 10, 2009, the dependency court terminated reunification services and set the matter for a section 366.26 hearing on December 7, 2009. The court told mother: "You got services with this [child] because we wanted to believe that you can do it, but in looking at the Title 20's[**3**] and in looking at the reports, you are doing the same thing [that you were doing] when you were 12, 13, 14, 15. Starting, stopping, starting, not finishing." The court ordered monitored visits once per month. The section 366.26 hearing was continued from date to date to July 13, 2010.

Parents filed separate section 388 petitions to change the August 10, 2009 order terminating reunification services and to reinstate reunification services. Father alleged

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3 Title 20's are the social worker's delivered services log.

circumstances had changed in that he attended weekly individual therapy sessions and weekly fatherhood group sessions, was discharged from parole, completed parenting classes, and visited for the maximum time allowed. He alleged Y. was closely bonded to him. Exhibits attached to father's petition indicated father began individual counseling in December 2009 with the goal of increasing frustration toleration and, as of February 2010, was "beginning to show symptom relief. His mood and affect are more stable and congruent. His communication style has improved." Mother alleged she completed a drug program and parenting classes, visited once a month, was strongly bonded to the child, was greatly concerned about his well-being in foster care, and had a stable residence. The dependency court granted a hearing on the petitions on the date scheduled for the section 366.26 hearing.

Father again refused to give a release of information for his individual therapist to talk to the social worker. Father's attendance in Project Fatherhood was poor.

Mother completed an outpatient drug program in May 2010 with random testing one to two times per month. She did not receive individual counseling.

Parents had monitored visits at the Department's office once a month for two hours from August 2009 to the date of the hearing. During the May 2010 visit, "father kept snatching toys away from [the] child and would tell him to share. Father also [stated], 'you need to share!' [and] when Y. would cry, [father] would tell him, 'Why are you crying and say please!' [F]ather did this to Y. many times throughout the visit. Father would say to mother and aunt, 'see . . . she (referring to caretaker) spoils him that's why he acts like this!' 'Well I am not having it, just wait till you come home. I'm not having it in my house!' 'You're gonna get your ass whipped!' Father continued to argue with Y. and repeating the same thing to him regarding him being spoiled by the caregiver. Father also kept hitting Y. softly on his butt to stop doing things." Mother did not appear concerned about father's verbal abuse and did not protect the child.

On April 28, 2010, father called the foster mother at 3:00 a.m., because he was awake and felt like calling her. The foster mother objected to being called so early. With

mother's support, father loudly and angrily complained to the social worker that he had a right to call the foster home whenever he pleased, even when everyone was asleep.

Y. was healthy, happy, and developmentally on target. He was very attached to his foster mother, who had been caring for him since he was three months old. She had an approved adoptive home study and was strongly committed to adopting him. Y. displayed a sense of belonging in his foster mother's home.

On July 13, 2010, the dependency court heard parents' section 388 petitions and held the section 366.26 hearing. The petitions were denied, as parents did not prove circumstances had changed. At the section 366.26 hearing, father argued that the exception to termination that he visited regularly and a continued relationship with him would benefit the child (§ 366.26, subd. (c)(1)(B)(i)) applied. Mother did not argue the exception applied to her.[4] The dependency court terminated parental rights, finding Y. was adoptable and no exception to termination applied in this case.

DISCUSSION

Denial of Parents' Section 388 Petitions Was Not an Abuse of Discretion

Parents contend denial of their section 388 petitions was an abuse of discretion. We conclude the dependency court did not abuse its discretion.

Under section 388,[5] the dependency court should modify an order if circumstances have changed such that the modification would be in the child's best interest. (*In re*

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[4] Mother merely "join[ed]" father's argument. As father did not argue anything about mother's visitation or that the child would benefit from continuing a relationship with mother, mother's joinder does not constitute an argument by mother that the exception applied to her.

[5] Section 388 provides in pertinent part that a parent "may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made . . . . [¶] . . . [¶] If it appears that the best

Kimberly F. (1997) 56 Cal.App.4th 519, 526 & fn. 5.) "Whether a previously made order should be modified rests within the dependency court's discretion, and its determination will not be disturbed on appeal unless an abuse of discretion is clearly established." (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1704.) """The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court."' [Citations.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) Abuse of discretion is established if the determination is not supported by substantial evidence. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 796.) In determining whether substantial evidence supports the factual findings, "all intendments are in favor of the judgment and [we] must accept as true the evidence which tends to establish the correctness of the findings as made, taking into account as well all inferences which might reasonably have been drawn by the trial court." (*Crogan v. Metz* (1956) 47 Cal.2d 398, 403-404.) The party requesting the change of order has the burden of proof. (Cal. Rules of Court, rule 5.570(h)(1); *In re Michael B.*, *supra*, at p. 1703.)

Once reunification services are terminated, the focus shifts from reunification to the child's need for permanency and stability, and a section 366.26 hearing to select and implement a permanent plan must be held within 120 days. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) For a parent "to revive the reunification issue," the parent must prove under section 388 that circumstances have changed such that reunification is in the child's best interest. (*Id.* at pp. 309-310.) "[O]ur Supreme Court made it very clear in [*In re Jasmon O.* (1994) 8 Cal.4th 398, 408, 414-422] that the disruption of an existing psychological bond between dependent children and their *caretakers* is an extremely important factor bearing on any section 388 motion." (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 531.)

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interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held . . . ."

"In deciding what services or placement are best for the child, time is of the essence. 'After reunification efforts have failed, it is not only important to seek an appropriate permanent solution—usually adoption when possible—it is also important to *implement* that solution reasonably promptly to minimize the time during which the child is in legal limbo. . . . Courts should strive to give the child [a] stable, permanent placement, and [a] full emotional commitment, as promptly as reasonably possible consistent with protecting the parties' rights and making a reasoned decision.' [Citations.] 'It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home," under the care of his parents or foster parents, especially when such uncertainty is prolonged.' [Citation.]" (*In re Josiah Z.* (2005) 36 Cal.4th 664, 674.)

With certain exceptions, parents of children under the age of three years when detained have six months to reunify. (§ 361.5, subd. (a)(1)(B).) "While [the months that must pass before a section 366.26 hearing is held] may not seem a long period of time to an adult, it can be a lifetime to a young child. Childhood does not wait for the parent to become adequate." (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 310.)

When the dependency court terminated reunification services in August 2009, parents had never had Y. in their custody or played a parental role. They had not completed individual counseling or a drug program, were using drugs, and had occasional monitored visits one to four times per month. Father did not take his prescribed psychiatric medication. Father displayed emotional problems of frustration and aggressiveness. When the dependency court ruled on parents' section 388 petitions one year later, they still were not playing a parental role, had not graduated beyond monitored visits, were visiting only once a month, and had not completed individual counseling. Father's behavioral problems were not resolved. He verbally abused Y., and mother did not protect Y. Father continued to verbally abuse the foster mother. Father did not complete a drug program. Mother completed a drug program, but her many past failures

to stay off drugs and the recentness of her sobriety left much uncertainty concerning whether she would be able to maintain sobriety.

Reinstating reunification services, whose outcome was doubtful, would delay permanency for a child whose status had been in limbo for two and a quarter years. Time is of the essence when it comes to securing a stable, permanent home for children; prolonged uncertainty is not in their best interest. (*In re Josiah Z., supra*, 36 Cal.4th at p. 674.) The statutory time for reunification had expired. (§ 361.5, subd. (a)(1).) Parents never provided Y. with a home or a sense of belonging. Y. was bonded to his foster parent, who had cared for and nurtured him for two years and wanted to adopt him. He felt he belonged to her. Disrupting an existing psychological bond with caretakers is not in a child's best interest. (*In re Kimberly F., supra*, 56 Cal.App.4th at p. 531.) This is substantial evidence that circumstances had not changed such that delaying permanency by restarting reunification services was in Y.'s best interest. Accordingly, denial of parents' section 388 petitions was not an abuse of discretion.

Substantial Evidence Supports the Finding That the Exception in Section 366.26, subdivision (c)(1)(B)(i) Does Not Apply

Father contends substantial evidence does not support the finding under section 366.26, subdivision (c)(1)(B)(i), that termination of parental rights would not be detrimental to the child.[6] We disagree with the contention.

Because father's contention asserts insufficiency of the proof, we apply the substantial evidence rule. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576; compare *In re Aaliyah R.* (2006) 136 Cal.App.4th

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[6] The parent has the burden to prove the applicability of the exception. (*In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1373.) As mother did not raise an issue below that the exception applied to her, she forfeited the contention. (See p. 7 and fn. 4 above.) (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 221-222.)

437, 449 [abuse of discretion standard of review].)[7] If supported by substantial evidence, the judgment or finding must be upheld, even though substantial evidence may also exist that would support a contrary judgment and the dependency court might have reached a different conclusion had it determined the facts and weighed credibility differently. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) Thus, the pertinent inquiry when a finding on the section 366.26, subdivision (c)(1)(B)(i), exception is challenged is whether substantial evidence supports the finding, not, as father argues, whether a contrary finding might have been made. "We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.] '"[T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find [that the order is appropriate]."' [Citations.]" (*In re Matthew S.* (1988) 201 Cal.App.3d 315, 321; see also *In re Dakota H., supra,* 132 Cal.App.4th at p. 228 ["[w]e do not reweigh the evidence"].)

Under section 366.26, subdivision (c)(1)(B)(i), if reunification services have been terminated and the child is adoptable, the dependency court must terminate parental rights unless it "finds a compelling reason for determining that termination would be detrimental to the child due to [the circumstance that the parent has] [¶] . . . maintained

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[7] "The practical differences between the two standards of review are not significant. '[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only "'if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did.' . . ."' [Citations.] However, the abuse of discretion standard is not only traditional for custody determinations, but it also seems a better fit in cases like this one, especially since the statute now requires the juvenile court to find a 'compelling reason for determining that termination would be detrimental to the child.' (§ 366.26, subd. (c)(1)[(B)].) That is a quintessentially discretionary determination. The juvenile court's opportunity to observe the witnesses and generally get 'the feel of the case' warrants a high degree of appellate court deference." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

regular visitation and contact with the child and the child would benefit from continuing the relationship."

"'Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.' [Citation.] . . . 'The Legislature has declared that California has an interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful.' [Citation.]" (*In re Celine R.* (2003) 31 Cal.4th 45, 52-53.) "At this stage of the proceedings, if an appropriate adoptive family is or likely will be available, the Legislature has made adoption the preferred choice. [Citation.]" (*Id.* at p. 49; see also § 366.26, subd. (b)(1) [adoption is the preferred plan].) "At this stage of the dependency proceedings, 'it becomes inimical to the interests of the [child] to heavily burden efforts to place the child in a permanent alternative home.' [Citation.] The statutory exceptions merely permit the court, in exceptional circumstances [citation], to choose an option other than the norm, which remains adoption." (*In re Celine R.*, *supra*, at p. 53.)

"[T]he exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) The type of parent-child relationship that triggers the exception is a relationship which "'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. . . .' [Citation.]" (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534; accord, *In re Jasmine D.*, *supra*, at pp. 1347-1350.)

Substantial evidence supports the finding that no exceptional circumstances existed under section 366.26, subdivision (c)(1)(B)(i), that required depriving Y. of a permanent, adoptive home. Regarding the first prong of the exception—maintenance of regular contact and visitation—father never had custody of Y., and, by his irregular, infrequent visitation, father did not take advantage of the opportunity the dependency court's orders gave him to develop a parental relationship. At the time of the hearing,

father's visits were monitored and infrequent. This is substantial evidence father did not maintain regular contact and visitation.

Regarding the second prong—that Y. would benefit from continuing the relationship—substantial evidence establishes that father's relationship with Y. did not promote Y.'s well-being "'to such a degree as to outweigh the well-being [the child] would gain in a permanent home with [a] new, adoptive parent[] . . . .' [Citation.]" (*In re Brandon C.*, *supra*, 71 Cal.App.4th at p. 1534.) Father was not rehabilitated. He abused drugs, inflicted verbal abuse on Y. during a visit, was angry and aggressive with the foster mother, and physically abused his older child during this dependency. Y. spent two and a half years in foster care, waiting for father to become an adequate parent. Y. had a loving and nurturing home where he felt he belonged and which was committed to providing him with permanency. The conclusion reached by the dependency court that termination of parental rights would not be detrimental is amply supported by substantial evidence.

DISPOSITION

The orders are affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.